Castaways Management, Inc. *and* Hotel, Motel, Restaurant & Hi-Rise Employees & Bartenders Union, Local 355, AFL–CIO *and* Hotel, Resort Service Union, Local 3 of Greater Miami & South Florida Area. Cases 12–CA–8831, 12–CA–8985, 12–CA–9184, and 12–CA–9179

August 14, 1992

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The issue in this case is the accuracy of the computations of interim earnings and setoffs to gross backpay in the compliance specification as amended.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The Respondent, Castaways Management, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall pay to the employees named below the amounts set forth opposite their respective names, plus interest accrued to the date of payment, minus taxes:

Kathleen Blenke	$8,167
Kenneth Downes	1,843
Randy Feigin	5,743
Maximino Gil	12,956
Joan Grinon	5,003
Georgette Linder	4,253
Irene Marzio	4,210
Carol White Wolfe	691

An additional $30,975 shall be placed in an escrow account with the U.S. Treasury, and held for 1 year pending the submission of interim earnings information by Andrea Mignoli. See *Starlite Cutting*, 284 NLRB 620 (1987).

[1] On April 29, 1992, Administrative Law Judge Lowell M. Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The General Counsel excepts to the judge's inadvertent misspelling of the names of two discriminatees. We find merit in this exception and modify the Order to reflect the correct spelling of the names of discriminatees Maximino Gil and Carol White Wolfe. We further modify the Order to reflect that the *Starlite Cutting* period for maintaining an escrow account for an unavailable discriminatee is 1 year, not 2 years as mistakenly stated by the judge.

Margaret J. Diaz, Esq., for the General Counsel.

Joel I. Keiler, Esq., of Reston, Virginia, for the Respondent.

Geof Bichlor, Esq., of Miami, Florida, for the Union.

SUPPLEMENTAL DECISION

LOWELL M. GOERLICH, Administrative Law Judge. This matter is before me pursuant to the following order of the Board dated June 12, 1991 (303 NLRB 374):

> It is ordered that the General Counsel's motion to strike the Respondent's answer is granted to the extent that it addresses allegations of the compliance specification pertaining to the computation of gross backpay.
>
> IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is granted except with regard to allegations concerning the discriminatees' interim earnings.
>
> IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 12 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge, for the purpose of taking evidence concerning the discriminatees' interim earnings. The judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

In its decision, among other things, the Board stated:

> As the Respondent has failed to deny specifically the gross backpay allegations or to explain adequately its failure to do so, we strike the Respondent's answers to the extent that they address those allegations of the compliance specification and deem those allegations of the second amended compliance specification to be admitted as true.

On January 22, 1992, the Regional Director for Region 12 issued an amendment to the second amended compliance specification. This amendment reflects certain changes in setoffs to gross backpay.[1] More specifically, certain changes are set forth in this document with respect to interim earnings figures for discriminatee Blenke, Downes, Gil, Grinon, and Marzio. Additionally, interim earnings figures for discriminatee Feigin are set forth for the first time.[2] Finally, a change in the dates of the excepted period for discriminatees Feigin (when he was unavailable for work due to an injury) at the end of 1979 and beginning of 1980 is also reflected.[3]

This matter came on for hearing before me in Miami, Florida, on February 24 and 25, 1992. Each party was af-

[1] The amendment reflects no change in gross backpay per se. Thus, it reflects no change in tne starting and ending dates of the backpay periods (that is, the dates when the discriminatees were fired and the dates when the facilities they had worked at were closed or, in one case, the date of reinstatement); no changes in the wage rates at which gross backpay is calculated; and no changes in the number of hours per week at which gross backpay is calculated.

[2] Feigin had previously been unlocated.

[3] The change in dates of the excepted period results in a net addition of one more day when discriminatee Feigin can collect backpay.

forded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

FINDINGS OF FACT,[4] CONCLUSIONS, AND REASON THEREFOR

By the testimony of Ginnie Daniel, compliance officer, the General Counsel offered prima facie proof of the amount of gross backpay due[5] and owing the discriminatees and that the method of computing the backpay was reasonable and a fair base was employed for arriving at the gross backpay due each discriminatee. Thus, the burden shifted to the Respondent ''to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.'' *United States Air Conditioning Corp*., 141 NLRB 1278, 1280 (1963), enfd. 336 F.2d 215 (6th Cir. 1964).

In the case of *NLRB v. Moone Aircraft Corp*., 366 F.2d 809 (5th Cir. 1966), the court commented:

> While the General Counsel has the burden of proving unlawful discrimination on the part of the employer, and hence that backpay is due, the employer usually has the burden of establishing affirmative defenses which would mitigate his liability. *NLRB v. Miami Coca-Cola Bottling Co*., supra [360 F.2d 569]; *NLRB v. Brown & Root, Inc*., 8 Cir. 1963, 311 F.2d 447. Among these affirmative defenses are availability of jobs because of nondiscriminatory factors, the employees' interim earnings to be deducted from the backpay award . . . . The cases are unanimous that the Employer must establish these defenses by a preponderance of the evidence *NLRB v. Miami Coca-Cola Bottling Co*., supra; *NLRB v. Master Plastics Corp*., 2 Cir. 1965, 354 F.2d 170); *NLRB v. Brown & Root, Inc*., supra.

The fact that the General Counsel included deductions of interim earnings in his backpay computation in no manner lessened the Respondent's burden.

The Respondent cross-examined the compliance officer whose testimony stood fast. The Respondent offered the testimony of Charles A. Kramer, a former president of Southern Hotel and Motel Association and a former partner in the Shelbourne Hotel. Kramer testified that 1977 through 1981 were the ''best years [he] could recall'' for the hotel business and hotels generally had ''staffing problems.'' Additionally, the Respondent offered the testimony of its counsel who testified that he had been informed that discriminatee Maximilliam Gil had been discharged for theft.

The Respondent rested without calling any of the discriminatees whom it declined to call as witnesses.

The Respondent's evidence was of little probative value being void of any valid reasonable inferences, and contributed nothing to validly impeaching the computations set forth in the specification.

Accordingly, there being no material and credible evidence presented in this case which supports a finding that the General Counsel's computations are not drawn according to law or technically correct, I adopt them and approve them.

[Recommended Order omitted from publication.]

[4] There being no objection to General Counsel's motion to correct transcript, the motion is granted and the transcript is corrected accordingly.

[5] ''We have heretofore held, with court approval, that in a backpay proceeding the burden is on the General Counsel to show only the gross amounts of backpay due.'' *United States Air Conditioning Corp*., supra at 1280.